SERVED: August 6, 1993

NTSB Order No. EA-3947

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 22nd day of July, 1993

JOSEPH M. DEL BALZO, Acting Administrator, Federal Aviation Administration, Complainant, v. FREDERICK K. DISTAD, Respondent.	Docket SE-11542

OPINION AND ORDER

Respondent has appealed from an initial decision of Administrative Law Judge Jerrell R. Davis, issued orally at the conclusion of an evidentiary hearing held on August 28, 1991.[1] By that decision, the law judge affirmed the Administrator's determination that respondent had violated sections 43.13(a) and (b) of the Federal Aviation Regulations ("FAR," 14 C.F.R.) in

[1]An excerpt from the transcript containing the initial decision is attached.

connection with maintenance work performed on a Cessna 185B aircraft on January 5, 1989.[2] In addition, the law judge sustained a 30-day suspension of the airframe rating on respondent's airman mechanic certificate, which had been ordered by the Administrator for such alleged FAR violations.

In the order of suspension (which served as the complaint), the Administrator alleged the following:

> 1. You are now, and at all times hereinafter mentioned were, the holder of Airman Mechanic Certificate No. 574569177, with Airframe and Powerplant Ratings.
>
> 2. On January 5, 1989, you performed maintenance on civil aircraft N2638Z, a Cessna Model 185B.
>
> 3. On completion of your maintenance you signed the following entry in the aircraft maintenance records:
>
> "Replaced and/or rebucked rivets in right and left wing spars and in some nose ribs. Resnap left fuel tank."
>
> 4. Your signature constituted approval for return to service, for the work which you performed on

[2]FAR § 43.13 provides in relevant part:

"§ 43.13 Performance rules (general).

(a) Each person performing maintenance, alteration, or preventive maintenance on an aircraft, engine, propeller, or appliance shall use the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, or other techniques, and practices acceptable to the Administrator. . . . He shall use the tools, equipment, and test apparatus necessary to assure completion of the work in accordance with accepted industry practices. . . .

(b) Each person maintaining or altering, or performing preventive maintenance, shall do that work in such a manner and use materials of such a quality, that the condition of the aircraft, airframe, aircraft engine, propeller, or appliance worked on will be at least equal to its original or properly altered condition (with regard to aerodynamic function, structural strength, resistance to vibration and deterioration, and other qualities affecting airworthiness)."

civil aircraft N2638Z.

5. The maintenance which you performed and approved for return to service was improperly performed due to the following discrepancies:

(a) Left wing:

(1) STA 100.5; nose rib, top outboard flange - six (6) rivets not properly d[ri]ven as per AC [(Advisory Circular)] 43.13-1A, Section 3, [P]aragraph 99.f.

(2) STA 100.5; wing rib, forward inboard flange riveted to spar cap (below strut attach fitting) one rivet not properly driven as per AC 43.13-1A, Section 3, [P]aragraph 99.f.

(3) Numerous countersunk rivets were replaced with rivets whose diameter was too large for the thickness of the skin, resulting in improper rivet grip.

(b) Right wing:

(1) STA 100.5; nose rib, top outboard flange - one rivet (1) 4th forward of spar not properly driven as per AC 43.13-1A, Section 3, [P]aragraph 99.f.

(2) STA 118.0; nose rib, top outboard flange - one rivet (1) 4th forward of spar is cut (deformed) and not properly set as per AC 43.13-1A, Section 3, [P]aragraph 99.f.

(3) STA 172.0; nose rib, top outboard flange - one rivet (1) most forward from spar does not meet the edge distance requirement as per AC 43.13-1A, Section 3, [P]aragraph 99.d (edge of rivet is on edge of flange).

(4) STA 190.0; nose rib, top outboard flange - one rivet (1) which goes through stiffener has displaced the rib flange and the rib is not attached at that point, contrary to FAR [section] 43.13([b]).

(5) Numerous countersunk rivets were

replaced with rivets whose diameter was too large for the thickness of the skin, resulting in improper rivet grip.

6. Following your maintenance, the condition of civil aircraft N2638Z was not at least equal to its original or properly altered condition.

Respondent has, through his representative, submitted a brief in which he maintains that AC 43.13-1A cannot provide a valid basis for the Administrator's certificate action because that circular "does not establish any regulatory requirements for the use, or installation of, countersunk head rivets."[3] Additionally, respondent asserts that the law judge committed a series of procedural errors both prior to and during the hearing which require reversal of the initial decision.[4]

For the reasons set forth below, we are unpersuaded by the arguments advanced by respondent and will, therefore, deny his appeal.

With respect to the applicability of AC 43.13-1A, we note that the record relates that there are no manufacturer's riveting

[3]Respondent's Br. 8.

[4]The Administrator has filed a reply brief, in which he urges us to find no error in the law judge's challenged actions and affirm his initial decision. Subsequently, respondent submitted a brief in rebuttal thereto and the Administrator filed a motion to strike that rebuttal brief. Under Rule 48(e) of the Board's Rules of Practice (49 C.F.R. § 821.48(e)), "[n]o further briefs [in addition to the appeal and reply briefs] may be filed, except upon specific leave of the Board upon a showing of good cause therefor." As respondent's rebuttal brief merely rehashes matters previously raised by him, such good cause has not been shown. Thus, the Board will grant the Administrator's motion to strike.

practice guidelines for the Cessna 185B,[5] and that the advisory circular therefore establishes the applicable methods, techniques and practices acceptable to the Administrator.[6] Paragraph 99.f of that circular sets forth guidelines for the fashioning of flat formed rivet heads ("bucktails"),[7] which, when viewed in the context of the evidence relating to various bucktail defects found in rivets installed by respondent on both wings,[8] clearly provides a basis for a finding of a violation of FAR section 43.13(a). Additionally, Paragraph 99.d of the advisory circular, which establishes standards for rivet-to-edge distances, provides a basis for a finding of a section 43.13(a) violation, in light of the evidence concerning respondent's placement of the rivet referred to in the complaint at right wing Station 172.0.[9]

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[5]Tr. 18-19, 68.

[6]Id. 18-19, 64-65, 69.

[7]We note that AC 43.13-1A ¶ 99.f applies to the formation of bucktails on all rivets, regardless of rivet head type. See Tr. 71-72. Thus, the Board finds no support for respondent's suggestion that ¶ 99.f does not apply to the installation of rivets with countersunk rivet heads.

[8]See Tr. 38, 88-99, 100-01, 104-06; Exs. C-4, C-15, C-16.

[9]See Id. 111-14. Respondent does not, in connection with his appeal, challenge the sufficiency of the evidence to establish the factual allegations set forth in the complaint. Thus, the Board will not review the law judge's determination that such allegations have been established. We also observe that respondent has not questioned whether those allegations support the FAR violations charged, and we will not, therefore, engage in a discussion of that matter other than to note that we believe that the Administrator's factual allegations are sufficient to sustain those charges.

Turning to respondent's procedural arguments, we note that he has contended that the law judge erred both in accepting a late-filed answer in opposition to his January 24, 1991 motion to dismiss the complaint, and in denying that motion. However, the law judge believed that there was good cause for the late filing of the Administrator's answer.[10] Moreover, even if no answer had been submitted (or if the law judge had not accepted the Administrator's answer), the motion to dismiss could not be sustained unless the factual allegations set forth in the complaint failed to provide a valid basis for the FAR violations charged.[11] As the complaint was not so deficient here, the law judge did not err in denying respondent's motion.

Respondent next asserts that the law judge erroneously

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[10]See Order Denying Respondent's Motion to Dismiss, n.1. While the Administrator's answer in opposition to respondent's motion was not filed until February 22, 1991, which was 29 days after respondent's motion was served (and 14 days after the expiration of the 15-day time limit for submitting an answer, as set forth in 49 C.F.R. § 821.14(c)), the law judge accepted as good cause for such a delayed filing the fact that respondent's motion was served on the FAA's Office of Chief Counsel in Washington, D.C. rather than its Office of Assistant Chief Counsel in Anchorage, Alaska, which was handling the case and upon which all previous documents had been served by respondent.

[11]Respondent's motion to dismiss was based on the Administrator's purported "fail[ure] to comply with Order, 2150.3A, Compliance and Enforcement Program prior to the issuance of the Order of Suspension." Such a claim does not, however, attack the sufficiency of the factual allegations to support the FAR violations charged. (And, as we previously indicated (see n.9, supra), we believe that the Administrator's allegations are not lacking in this respect.) Respondent also sought to raise the Administrator's alleged departure from his compliance policy as an affirmative defense to the charges brought against him. We will address that matter separately below.

granted the Administrator's April 26, 1991 motion to suspend his representative, due to the representative's failure to surrender his mechanic certificate and inspection authorization, for which an order of revocation had been in effect for several years.[12] While the Board does not believe that this suspension was proper,[13] we note that the law judge's order (which was issued on May 7, 1991) remained in effect for only a short time (the representative subsequently surrendered his mechanic certificate and inspection authorization on May 13, 1991) and that respondent has not demonstrated that his ability to present his defense to the Administrator's charges was adversely affected thereby. Consequently, we find that any error committed by the law judge in this respect was harmless.

Respondent also maintains that the law judge erred in admitting into evidence a series of photographs depicting his riveting work (Exhibits C-8 through C-16) because the Administrator did not make those photographs available to him prior to the hearing. However, respondent did not ask the

[12]The representative's mechanic certificate and inspection authorization had been revoked by the Administrator for alleged violations of FAR §§ 43.13(a) and (b), and 43.15(a). That order of revocation was affirmed by an NTSB law judge in December 1987 and the Board subsequently issued an order dismissing his unperfected appeal of the law judge's decision in May 1988.

[13]Under Rule 6(a) of the Board's Rules of Practice (49 C.F.R. § 821.6(a)), representatives of parties to certificate actions may be suspended "[u]pon hearing, and for good cause shown." It appears that Rule 6(a) was not complied with here, in that the law judge did not hold a hearing prior to granting the Administrator's motion and the grounds for the suspension bore no relationship to the conduct of respondent's representative in the case at bar.

Administrator to provide any photographs or other documentary evidence in connection with discovery conducted in association with this litigation.[14] Thus, we see no valid basis for respondent's objection to the admission of the photographs in question.

Respondent has further contended that the Administrator, in proceeding with an enforcement action against him, violated FAA compliance policy--which, he maintains, calls for other, less stringent, measures, such as education and counseling, prior to the bringing of a certificate action--and that he should, therefore, have been permitted by the law judge to proffer an affirmative defense based upon such policy.[15] However, the Administrator's decision to bring a certificate action, rather than seek some other remedy against respondent, is a determination which is outside the Board's scope of review.[16] Moreover, the policy guidelines cited by respondent do not, as he

[14]In his sole discovery request, respondent asked only for "a list of the names of the witnesses, that may be called by the Administrator to testify against him in this case, along with a summary of the testimony each is expected to present at the hearing."

[15]In a series of motions which were considered and denied by the law judge, respondent cited, in support of his position, FAA Order 2150.3A Chapter 2, FAA Order 8300.10 Chapters 210 and 213, and remarks delivered by former Administrator James B. Busey in connection with a March 1990 General Aviation Compliance Program Briefing.

[16]See, e.g., Administrator v. Jobe, 5 NTSB 1440, 1442 n. 7 (1986); Administrator v. Connaire, Inc., NTSB Order EA-2716 at 12 (1988), affirmed 887 F.2d 723 (6th Cir. 1989); Administrator v. Rigsby, NTSB Order EA-3860 at 4 & n.6 (1993).

suggests, mandate that airmen be educated and/or counselled on the subject of compliance with the FARs before enforcement actions may be brought; indeed, those policy guidelines fail to impose any restrictions upon the Administrator's exercise of prosecutorial discretion in such matters.[17]

The Board also observes that several other procedural arguments were raised by respondent in his appeal brief. While we have noted and considered such arguments, we find them so lacking in merit as to warrant rejection without further discussion herein.

Finally, in reviewing the sanction ordered by the Administrator and sustained by the law judge, we note that a 30-day suspension of respondent's airframe rating is, if anything, a lenient penalty for the FAR violations established in this case. Consequently, that suspension will be affirmed.

[17]Thus, this case differs from Administrator v. Montgomery, et al., 3 NTSB 2150 (1980), in which the Board found that the Administrator had specifically limited his prosecutorial discretion in connection with the Aviation Safety Reporting Program. 3 NTSB at 2154.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The 30-day suspension of the airframe rating on respondent's airman mechanic certificate shall begin 30 days from the date of service of this order.[18]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[18]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR §§ 61.19(f) and 65.15(c).